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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHERN OIL COMPANY, INC., BRAY OIL COMPANY, INC., NORTHERN TERMINALS, INC., and DANA S. BRAY,
Petitioners,

v.

STANDARD OIL COMPANY OF CALIFORNIA and CHEVRON U.S.A. INC.,
Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

JOHN P. MONTE, ESQ.
Attorney of Record

RICHARD E. DAVIS, ESQ.
Attorney for Petitioners
30 Washington St., Box 666
Barre, Vermont 05641
(802) 476-3123

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The TECA's Ruling That Bray Oil Had The Duty To Test The Truth Of Chevron's Misrepresentation By The Exercise Of Due Diligence Violates EPAA Policy

The TECA has imposed a more stringent fraud standard upon Bray Oil in a closed market than would be required in a free, open market.

The closed market we are referring to is the national energy crisis that began in 1973 and the Emergency Petroleum Allocation Act (15 U.S.C. § 751, et seq.) that was enacted to handle the

crisis. Congress passed the EPAA into law in order to preserve competition and assure equal distribution of critically short oil supplies in a market where the laws of supply and demand were not operating. Conference Report, H.R. Rep. No. 93-628, 93d Cong., 1st Sess. 1973, U.S. Code Cong. Ad. News, pp 2582, 2688. Congress was particularly concerned with protecting small independent refiners and marketers from large intergrated companies. *Basin Inc. v. Federal Energy Administrator,* 552 F.2d 931, 936 ((Temp. Emer. Ct. App.) *cert. denied,* 434 U.S. 821 (1977).[1]

In short, the EPAA expressed the Congressional mandate that large oil companies should be prevented from taking advantage of a national crisis to reap windfall profits and drive comparatively small marketers out of business.

Nevertheless, through fraud, duress and circumvention of federal regulations, this is precisely what Chevron accomplished in its treatment of Bray Oil, as a jury of respondents' peers clearly found. App. 131-143. The district judge found Chevron had overcharged Bray Companies with criminal intent to violate the EPAA. App. 51-60; *Eastern Air Lines v. Atlantic Richfield Co.,* 712 F.2d 1402, 1411 (TECA 1983) ("wilfulness is used in §210 in the criminal sense"). The TECA's ruling that petitioners had a duty to investigate the truth of Chevron's misrepresentation which was designed specifically to obtain the 1975 release from Bray Oil, (App. 11-12) results in obvious derogation of explicit congressional policy concerns.

TECA's "due diligence" requirement not only conflicts with Congressional intent and public policy embodied in the EPAA, it conflicts with all modern principles of common law fraud. Prosser sums it up:

> The last half-century has been a marked change in the attitude of the courts toward the question of justifiable reliance. Earlier decisions, under the influence of the prevalent doctrine of 'caveat

[1] The respondents herein are a prime example of a company with which "Congress was particularly concerned". Even in a free market, integrated oil companies control the vast majority of the production and supply of crude oil as well as refining and distribution of petroleum products.

> emptor' laid great stress upon the 'duty' to protect himself and distrust his antagonist and held that he is not entitled to rely even upon positive assertions of fact made by one with whom he is dealing at arm's length. It was assumed that anyone may be expected to overreach another in a bargain if he can, and that only a fool will expect common honesty. Therefore, the plaintiff must make a reasonable investigation, and form his own judgment. The recognition of a new standard of business ethics, demanding that statements of fact be at least honestly and carefully made, and in many cases that they be warranted to be true, has led to an almost complete shift in this point of view.
>
> It is now held that assertions of fact . . . may justifiably be relied on without investigation, not only where such investigation would be burdensome or difficult, but likewise where the falsity of the representation might be discovered with little effort by means easily at hand.
>
> Prosser, The Law of Torts (1971 ed.)
> Misrepresentation at p. 717-718

A comparison of EPAA policy and Prosser's summary of the demise of the "due diligence" requirement of common law fraud, illustrates the manifest unfairness of the TECA's formulation of federal common law fraud. Should this Court grant this writ, it would be no difficult task to spell out the proper elements of a fraud claim brought under the EPAA. As will be seen, the TECA's decision in this regard will indeed affect litigants now before that court.

The Questions Presented In This Petition Will Recur And In Fact Are Currently Pending Before The TECA

Chevron argues that since the federal questions presented in this petition are "extremely unlikely to recur", review by this Court would serve no purpose. We disagree. The TECA fashioned the federal fraud law in question for the very purpose of future application. The following excerpt from the Oral Argument before the TECA on January 18, 1985, clearly demonstrates this point:

Judge Hoffman: Well, in effect, Judge Holden held that Mr.

Bray had a duty to do some reasonable investigation.

Mr. Davis: This business of a duty to investigate, as I've indicated is clearly contrary to Vermont law. You do not have to do that.

Judge Hoffman: But I don't think it's contrary to the federal common law.

Mr. Davis: There's nothing I know of in federal common law that applies to an action of fraud which says the defrauded party has a duty to go out and find out if he's been defrauded or not. He has a right to rely —

Judge Metzner: *Common law is what this Court says it's going to be.* [emphasis added]. . .

Judge Gignoux: *There is, of course, a line of authority in principle which indicates that where federal statutes are involved, in cases arising in federal statutes, federal common law should be a uniform nature so that the statute and principles are applied in the same way in Vermont or in Oklahoma even though with the state law only two states might differ.* [emphasis added]

This excerpt shows the TECA anticipates the federal common law fraud issue will indeed recur. It cannot be seriously argued the TECA would feel the need to fashion uniform federal law if it were otherwise. Furthermore, in the cases currently pending before the TECA, fraud, misrepresentation, estoppel by misrepresentation and waiver of EPAA rights are all stated issues on appeal.

In the case of *Chevron Oil Company (defendant-appellant) v. James Q. Rainey and Edwin E. Wampler,* TECA Docket No. 9-91, the following issues are presented in Union Oil's revised opening brief:

B. Whether there is substantial evidence in the record to support the jury's refusal to find that Rainey and Wampler procured the AMI purchase agreement through fraud (by misrepresentation and by nondisclosure).

Whether a fraudulently procured contract can be the basis of an award of damages under a claim for curcumvention of a

gasoline supply obligation in violation of Section 205.202 of the Mandatory Petroleum Allocation Regulations (10 C.F.R. §205.202 (1979).

In *MGPC, Inc.* (*plaintiff-appellee*) *v. Department of Energy, et al,* (defendants-appellants, TECA Docket No. 10-52) the following issue is presented by the DOE:

> Alternatively, whether the district court erred in finding that as a result of certain disputed oral representations, that the FEA is estopped from denying MGPC the benefit of the interim-exception relief for the entire period of price controls.

The issue of the validity of a contractual waiver of EPAA regulatory provisions is presented in the case of *Cibro Petroleum Products, Inc.* (*plaintiff-appellees*) *v. SOHIO Alaska Petroleum Company* (*defendant-appellant*), TECA Docket No. 2-47:

> Whether the district court erred in holding that the crude oil supply contract between SOHIO Alaska Petroleum Company ("SOHIO") and Cibro Petroleum Products, Inc. ("Cibro"), did not contain a valid waiver of Cibro's rights under 10 C.F.R. §211.63 to continuation of its supplier/purchaser relationship with SOHIO.

This Court's interest in these federal questions is not purely historical. *Union Oil* and *MGPC* may involve choice of law questions which will induce the TECA to apply the elements of "federal" common law fraud. *Cibro* involves the appeal of a district court determination, (*Cibro Petroleum Products v. SOHIO Alaska Petroleum,* 602 F. Supp. 1520 (1985)) that a contractual waiver of EPAA rights is invalid because it conflicts with certain federal crude oil supply regulations.

Likewise, the federal question of when a cause of action for overcharge accrues, continues to be a popular issue on appeal. Chevron's own citations establish the likelihood that this issue will recur.[2] In addition, the TECA's ruling in petitioners' case

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[2] *Leiner V. Atlantic Richfield Co.,* 731 F.2d 898, 900-901 (Temp. Emer. Ct. App. 1984); *Western Mountain Oil, Inc. v. Gulf Oil Corp.,* 726 F.2d. 765, 767 (Temp. Emer. Ct. App. 1983); *Fleetwing Corp. v. Mobil Oil Corp.,* 726 F.2d 768, 770 (Temp. Emer. Ct. App. 1983); *Siegal Oil v. Gulf Oil Corp.,* 701 F.2d 149, 153 (Temp. Emer. Ct. App. 1983); *Shell Oil Co. v. Nelson Oil Co.,* 627 F.2d 228, 236 (Temp. Emer. Ct. App., *cert denied* 449 U.S. 1022 (1980)

went far beyond all prior decisions. As the dissenting voice of the TECA panel points out (App. 19-21), the majority has decided that a cause of action for overcharges does not accure when a supply contract is executed, but when the first misclassification occurs. This decision not only violates public policy, but has the effect of barring any and all private claims for overcharges brought outside the time requirements of the various state statutes of limitations, which are routinely applied by the federal district courts.

Respondents have asserted the "time of accrual" issue is unlikely to recur and that it is "unaware of any other pending case" in which this issue is presented. This statement is misleading because, as in the case of "federal common law fraud", the "accrual" issue is currently pending before the TECA.

In a case currently on appeal to the TECA, *CPI Crude, Inc., (plaintiff-appellant) v. Thomas D. Coffman, et al. (defendants-appellees)*, Docket No. 5-114, the following issue is presented:

> Whether the district court erred in granting defendants' motions for summary judgment by finding that plaintiff-appellants' private overcharge action, brought pursuant to Section 210 of the Economic Stabilization Act, 12 U.S.C.A. §1904 note, was barred by the *two year limitations period* [emphasis added] found in the pre-amendment version of Tex. Cer. Stat. Ann. Art. 5526(4)?

Consequently, the utility of this Court's review of the federal questions presented in this petition is readily apparent.

Respondents' Recitation of the Facts

Chevron's "Statement of the Case" should be dismissed from consideration by this Court, for compelling reasons.

Petitioners are requesting this Court to review the TECA's mandate which, in crucial part, upheld a judgment notwithstanding the verdict. App. 10. The concern of this Court for a petitioner's right to a trial by jury and denial of that right by an inappropriate grant of J.N.O.V., should not be taken lightly by the respondents.

The evidence must be viewed most favorably to petitioners. *Brady v. Southern Railway Co.*, 320 U.S. 476, 479-80 (1943). It was for the jury to "balance" the evidence, and it cannot be stated too strongly that neither the district judge, nor the TECA, nor Chevron is permitted to present the evidence to its liking. *Brady,* supra.

This, however, is exactly what Chevron has done.

On page one of respondents' opposition brief ("O.B. 1") it is stated that petitioners have significantly distorted the facts, and that to correct these distortions:

> "... we refer to the opinion of the Tempoprary Emergency Court of Appeals (TECA), which sets forth a more balanced statement of the facts necessary to understand the issues presented by the petition."

After that particular "referral" is made, Chevron does not cite the TECA opinion throughout its statement of the case. Instead, Chevron cites the district court's opinions no less than eight times.

Chevron then begins its factual recitation on some indefinite summer's day in 1975 (O.B. 1), without mentioning the FEA had issued a Notice of Probable Violation of Federal Energy Regulations to Chevron on October 24, 1974. Chevron also omits mention of Chevron's first notice of default and its all too clear threat of termination of supply that was sent to Bray Oil three weeks after the NOPV was issued. A second and third notice of default followed (a fourth notice would have automatically terminated supply by the terms of the 1974 contract), and at the end of June 1975, Chevron demanded cash before delivery terms.[3] The Jury's determination that the release was procured by duress, still intact factually,[4] includes the specific finding that "Chevron's threat to continue the plaintiffs on cash before delivery credit terms, was wrongful and without justification". App. 133.

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[3] Chevron concedes that under federal regulations, ". . . a refiner was required to supply its base period customers with base period prices whether or not there was a contract". O.B. 20

[4] The jury may have found that the duress was ratified by Bray Oil in Special Verdict 4(b). App. 134.

Chevron's attempt to make Bray Oil a "party" or otherwise intimately involved with the FEA in its NOPV investigation is a fabrication. See O.B. 2-3. Bray had notified its customers that it intended to change credit terms because Bray Oil's credit terms had been changed by Chevron. A Bray Oil customer complained about this to the FEA. Mr. Salmon of the FEA contacted Bray Oil in order to investigate this complaint. He was informed by Bray Oil that it was forced to change the credit terms to its customers because of the change in credit terms imposed upon Bray Oil by Chevron. Upon being advised by Mr. Salmon that no such change in credit terms could be made under federal regulations, Bray Oil returned to its original credit terms. This is the "informal prodding" Chevron refers to in its opposition brief, which led to FEA's issuance of the NOPV directed at Chevron.

It is quite true that petitioners' did not file a formal complaint before the FEA, although the FEA *suggested* they do so. O.B. 5. However, the evidence is overwhelming that the FEA's advice referred to Chevron's reimbursement for overcharges resulting from the "as of May 1, 1973" contract. This "claim of reimbursement" was outside the scope of the NOPV. There is not one scrap of logically consistent evidence suggesting that the FEA informed petitioners that the NOPV investigation would not continue on course unless such a complaint were filled. Attorney O'Brien's testimony clarifies this point.

(Re-direct):

Q. I don't want to beat the horse to death here. Is there a distinction in your mind, Mr. O'Brien, in answering these various questions relative to a formal complaint versus the NOPV that had been issued previously to Chevron by the FEA.

A. Yes.

Q. And what is that?

A. Well, the NOPV was an action taken by the governmental agency in what I understood was its own motion or initiative, and I did not know, at that point, what the NOPV said, or specifically, what issues it related to. And it was my understanding from what Mr. Costello was urging, was that if we

> wanted to get to some form of calculation of damages, or something of that sort, that that would require some affirmative action on our part.

Chevron's Mr. Pfefferkorn had exactly the same understanding as Attorney O'Brien. In a letter to the Regional Director of the FEA, dated May 12, 1975, Mr. Pfefferkorn expresses his understanding of Mr. Costello's "proposed complaint".

> At the outset of the meeting (April 24, 1975) we were most concerned to learn. . . the FEA was contemplating the issuance of a remedial order against Chevron without what appeared to us to be a thorough investigation.
>
> . . . a consideration of any complaint which Bray might see fit to allege, will only delay the resolution of this immediate problem. A proper investigation of any complaint *on other subject matters* [emphasis added] would require an additional period of time which works to Chevron's obvious detriment.

Thus, it is quite beyond dispute that petitioners "claims on the merits" were not presented by way of a formal complaint to the FEA, because both Chevron and Bray Oil were waiting for *a final decision,* by the FEA on its own notice of probable violation of federal regulations. Both Chevron and Bray Oil believed the filing of a formal complaint would delay that decision. The testimony of FEA's William Costello firmly establishes this fact. The NOPV was not "technically" rescinded because Bray Oil did not file formal complaint.

Both Dana Bray and his attorney repeatedly testified that there was no reasonable hope of getting the FEA to reconsider its action by the use of a "formal complaint". The submission of a formal damage claim to the FEA was not considered by Bray Oil to be of any practical utility. In fact, this very point was discussed by Attorney O'Brien and Dana Bray just prior to execution of the release. Attorney O'Brien, a former Vermont Superior Court Judge, testified that since he believed the FEA had determined Chevron had not violated federal regulations, he could not provide Dana Bray with a sufficient basis on which to forecast a successful

outcome of either litigation or the possibility of initiating new administrative proceedings. (Appellate Record 377, 379). [5]

Chevron advanced the same contentions discussed above, to the TECA. The petitioners rebutted each and every point, with either evidence to the contrary or with undisputed evidence. Most importantly, the man most active in defrauding Bray Companies and violating federal regulations, Chevron's chief negotiator, Eric Pfefferkorn, did not take the stand at trial, and never once denied in his deposition testimony which was read to the jury, that he informed Dana Bray, by letter and telephone, that the FEA had made a final decision of its NOPV in Chevron's favor. Chevron's contention that Pfefferkorn's oral misrepresentation was "vigorously disputed at trial" underscores its disregard of the J.N.O.V. standard of appellate review. O.B. 5.

Petitioners believe that an unwarranted grant of J.N.O.V. is always of interest in this Court. However, the issues presented in this petition are capable of swift resolution without factual review of any kind. The decisive legal issue is whether a "duty to investigate" the truth of a material misrepresentation is an element of federal common law fraud. Cf. *Dice v. Akton, C&Y&R Co.*, 342 U.S. 359 (1952).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be GRANTED.

Respectfully submitted,

JOHN P. MONTE, Esq.
Attorney of Record

RICHARD E. DAVIS, Esq.
Attorney for Petitioners

August 23, 1985

[5] The alleged testimony of "Mr. Bray's banker" does not appear in the Record on Appeal. See O.B 7